[Cite as *Erin Capital Mgt., L.L.C. v. Fournier*, 2012-Ohio-939.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Erin Capital Management LLC,	:	
Plaintiff-Appellee,	:	
		No. 11AP-483
v.	:	(M.C. No. 2009 CVF 022203)
Alison R. Fournier,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 8, 2012

Javitch, Block & Rathbone, LLC, and *Audra T. Funk*, for appellee.

Organ Stock, LLP, and *Shawn J. Organ*, for appellant.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Defendant-appellant, Alison R. Fournier, appeals a judgment of the Franklin County Municipal Court denying her motion to vacate a default judgment in favor of plaintiff-appellee, Erin Capital Management LLC ("Erin Capital"). For the following reasons, we reverse and remand.

{¶2} On May 22, 2009, Erin Capital filed a complaint seeking repayment of $12,048.99 in credit card debt that it alleged Fournier had accrued. According to the complaint, Bank of America, the issuer of the credit card, had assigned Fournier's debt to Erin Capital.

{¶3} Erin Capital instructed the Clerk of the Franklin County Municipal Court to serve Fournier via certified mail at 695 South Sixth Street in Columbus, Ohio. In

accordance with this instruction, the clerk issued a summons and mailed it and the complaint to Fournier at the specified address on June 3, 2009. Approximately two and one-half weeks later, the United States Postal Service marked the envelope containing the summons and complaint "UNCLAIMED" and returned it to the clerk. Erin Capital then requested that the clerk serve Fournier at the Sixth Street address by ordinary mail. The clerk complied, mailing the second summons and complaint on June 24, 2009. The United States Postal Service did not return that summons and complaint as undeliverable.

{¶4} On August 14, 2009, Erin Capital moved for default judgment due to Fournier's failure to plead or otherwise defend. Three days later, the trial court granted the motion and entered judgment against Fournier in the amount of $12,048.99, plus interest.

{¶5} On August 24, 2009, Erin Capital's attorney mailed Fournier a letter to notify her that Erin Capital intended to garnish her wages. Instead of mailing this letter to the Sixth Street address, Erin Capital's attorney addressed the letter to Fournier at 684 Mohawk Street in Columbus, Ohio. The letter informed Fournier that she could avoid garnishment if she completed a form entitled "Payment to Avoid Garnishment" and returned it, along with the payment shown due on the form, to Erin Capital's attorney. On September 3, 2009, Fournier mailed to Erin Capital's attorney the completed form, a $238.99 payment, and copies of her two of her most recent pay stubs.

{¶6} Fournier submitted one other payment to prevent garnishment before she stopped responding to Erin Capital's efforts to collect on its judgment. On June 3, 2010, Erin Capital sought, and the trial court issued, an order of garnishment, which was served on Fournier's employer, Jacob Neal Salon ("Jacob Neal"). Three weeks later, Fournier moved to vacate the default judgment rendered on August 17, 2009.

{¶7} In the affidavit attached to the motion to vacate, Fournier testified that she lived at 684 Mohawk Street, having moved there in February 2008. Fournier averred that her parents resided at the Sixth Street address to which the clerk mailed the summons and complaint, but she never resided there. In another affidavit, Fournier's mother verified that her address was 695 South Sixth Street, but she claimed that she never received the certified or ordinary mail containing the summons and complaint. Based on

this affidavit testimony, Fournier argued that the trial court never had personal jurisdiction over her, and consequently, the August 17, 2009 judgment was void.

{¶8} In response to Fournier's motion, Erin Capital contended that Fournier had a greater connection to the Sixth Street address than her affidavit testimony suggested. Erin Capital pointed out that Fournier's pay stubs, which she had submitted with her payment to avoid garnishment, listed 695 South Sixth Street as her address. Erin Capital requested a hearing on the motion to vacate so that it could question Fournier about her affidavit testimony and the trial court could adjudge Fournier's credibility.

{¶9} The trial court scheduled a hearing on Fournier's motion for February 16, 2011. At the hearing, Fournier testified that she lived in Charlotte, North Carolina from 2000 to 2003. In 2003, Fournier decided to relocate to Columbus, where her parents lived. Fournier traveled back and forth between Charlotte and Columbus during her search for a job in Columbus. Eventually, Fournier secured employment at Jacob Neal, where her mother was the office manager. Because Fournier did not have a permanent address when Jacob Neal hired her, Fournier's mother placed her own address on the paperwork that Jacob Neal required of newly hired employees. Thus, Fournier's parents' address appeared on Fournier's pay stubs.

{¶10} Once Jacob Neal hired Fournier, she leased a house in Columbus. Fournier lived there until she purchased her residence at 684 Mohawk Street in February 2008. She never lived at her parents' residence on Sixth Street and she never gave out her parents' address as her permanent address.[1]

{¶11} Although she established her own residence upon moving to Columbus, Fournier did not correct the address on her pay stubs. Fournier explained that Jacob Neal deposited her pay directly into her bank account, and thus, Jacob Neal never actually mailed her paycheck or pay stub to the Sixth Street address.

{¶12} Fournier stated that she made the two payments to Erin Capital because she was scared by the numerous threatening and harassing telephone calls she was receiving from Erin Capital. Also, Erin Capital told Fournier that if she made the payments, it

[1] Fournier grew up living with her parents in Dayton, Ohio. Fournier's parents did not purchase the Sixth Street residence until 1999.

would send her documentation regarding her alleged credit card debt. Fournier denied owing the debt.

{¶13} Fournier's mother testified that she never saw a certified mail envelope addressed to her daughter at 695 South Sixth Street. Additionally, she did not recall receiving any items via ordinary mail addressed to her daughter at 695 South Sixth Street.

{¶14} At the conclusion of the hearing, the trial court orally denied the motion to vacate. The trial court entered judgment consistent with its oral ruling on May 18, 2011. Fournier now appeals that judgment, and she assigns the following error:

> Whether the trial court erred when it denied Defendant-Appellant Alison R. Fournier's Motion to Vacate Default Judgment.[2]

{¶15} Fournier argues that the trial court erred in ruling that she was properly served with process. Because service failed, Fournier contends that the trial court lacked personal jurisdiction over her, making the August 17, 2009 default judgment void. We agree.

{¶16} In order to render a valid judgment, a trial court must have personal jurisdiction over the defendant. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. A trial court lacks such jurisdiction if effective service of process has not been made on the defendant and the defendant has not voluntarily appeared in the case or waived service. *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, paragraph one of the syllabus; *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. No. 05AP-51, 2005-Ohio-5924, ¶27. If service is defective, a subsequent default judgment is void. *Cappellino v. Marcheskie*, 11th Dist. No. 2008-T-5322, 2008-Ohio-5322, ¶12; *Bowling* at ¶27. A defendant may challenge such a judgment through a motion to vacate. *Green v. Huntley*, 10th Dist. No. 09AP-652, 2010-Ohio-1024, ¶11. An appellate court reviews the denial of a motion to vacate under an abuse of discretion standard. *Stonehenge Condominium Assn. v. Davis*, 10th Dist. No. 04AP-1103, 2005-Ohio-4637, ¶13.

{¶17} Civ.R. 4.1 allows service of process by certified or express mail, personal service, or residence service. Here, Erin Capital first attempted service by certified mail,

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[2] This "assignment of error" merely raises an issue; it does not affirmatively state that the trial court erred. Nevertheless, we will presume that Fournier assigns as error the denial of the motion to vacate.

but it was returned unclaimed. Erin Capital then turned to Civ.R. 4.6(D), which permits a plaintiff to request service of process by ordinary mail if the certified mail is returned unclaimed. Such service is "deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." Civ.R. 4.6(D).

{¶18} If a plaintiff follows the civil rules governing service of process, a rebuttable presumption of proper service arises. *Babbitt & Weiss, LLP v. Flynn*, 10th Dist. No. 11AP-2, 2011-Ohio-4835, ¶6; *Green* at ¶13; *First Resolution Investment Corp. v. Davis*, 10th Dist. No. 05AP-328, 2005-Ohio-4976, ¶10. Here, because the service of process sent by ordinary mail was not returned to the clerk, a rebuttable presumption of proper service upon Fournier arose. See, e.g., *Flynn* at ¶8; *First Resolution Investment Corp.* at ¶11.

{¶19} A defendant can rebut the presumption of proper service with sufficient evidence that service was not accomplished. *Griffin v. Braswell*, 187 Ohio App.3d 281, 2010-Ohio-1597, ¶15; *Ramirez v. Shagawat*, 8th Dist. No. 83259, 2004-Ohio-1001, ¶15. A failure of service of process, despite compliance with the civil rules, exists in two different scenarios. First, service is not accomplished if the plaintiff fails to direct the summons and complaint to the defendant's residence or to an address where the plaintiff could reasonably expect that the summons and complaint would be delivered to the defendant. *Grant v. Ivy* (1980), 69 Ohio App.2d 40, 42. See also *Cent. Ohio Sheet Metal, Inc. v. Walker*, 10th Dist. No. 03AP-951, 2004-Ohio-2816, ¶10 ("The rebuttable presumption of proper service * * * may be rebutted by evidence that [the defendant] never resided nor received mail at the address to which such ordinary mail service was addressed."). Second, service fails where the defendant does not receive the summons and complaint, even though the plaintiff complied with the civil rules and service was made at an address where the plaintiff could reasonably anticipate that the defendant would receive it. *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66-67. Our analysis focuses on the first scenario, which stems from the due process requirement that " 'notice [be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406,

quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 657.

{¶20} Civ.R. 4.1 and 4.6 specify how service must be made, but not where, or to whom, process may be served. *Swinehart* at 404-05. Thus, when choosing where to direct service, plaintiffs must comply with the due process mandate that service be reasonably calculated to reach its intended recipient. Id. at 405-06. Courts examine each case on its particular facts to determine if the plaintiff satisfied this constitutional duty. Id. at 407.

{¶21} Obviously, a defendant will most likely receive service of process at his or her residence. *Bell v. Midwestern Educational Servs., Inc.* (1993), 89 Ohio App.3d 193, 202. However, "[s]ervice need not be made to the party's actual address so long as it is made to an address where there is a reasonable expectation that service will be delivered to the party." *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 124. See also *Cincinnati Ins. Co. v. Lafitte*, 2d Dist. No. 21055, 2006-Ohio-1806, ¶6 ("A serving party must have a 'reasonable expectation' that the party being served will receive mail at the address to which the mail is sent."); *J.R. Productions, Inc. v. Young* (1982), 3 Ohio App.3d 407, 409 ("Service must be made to an address where it can be reasonably anticipated that the service will be delivered to the defendant * * *."). Applying this rule, courts have held that service to a residence that a defendant owns, even if he or she does not live there, comports with due process. See, e.g., *Law Offices of James P. Connors v. Cohn*, 10th Dist. No. 08AP-1031, 2009-Ohio-3228, ¶15; *Cappellino* at ¶25-27; *Bonnieville Towers Condominium Owners Assn., Inc. v. Andrews*, 8th Dist. No. 89838, 2008-Ohio-1833, ¶14; *News-Herald v. Bahr*, 11th Dist. No. 2002-L-176, 2003-Ohio-6223, ¶20; *Sweeney v. Smythe, Cramer Co.*, 11th Dist. No. 2002-G-2422, 2003-Ohio-4032, ¶26. Likewise, courts have concluded that if a defendant gives out a particular address as his or her mailing address, service directed to that address satisfies the requirements of due process. See, e.g., *Collins v. Robinson*, 2d Dist. No. 20954, 2006-Ohio-407, ¶6; *Friedman v. Kalail*, 9th Dist. No. 20657, 2002-Ohio-1501; *Council v. Wilson* (May 17, 2001), 8th Dist. No. 78083.

{¶22} Two Ohio appellate courts have addressed whether service at the residence of a defendant's relative is reasonably calculated to reach the defendant. Both courts

found such service failed to comply with due process. In *Apostolouski v. Sharp*, 10th Dist. No. 04AP-1105, 2005-Ohio-2559, the plaintiff directed service of process to the defendant at the residence of the defendant's mother. The defendant, who was a college student, did not live with his mother. This court concluded that "due process required [the plaintiff] to serve [the defendant] with the complaint in a manner that would provide him notice of the action and not force him to rely on either of his parents to transmit information about the suit." Id. at ¶34. In *Bank One Cincinnati, N.A. v. Wells* (Sept. 18, 1996), 1st Dist. No. C-950279, service of process was mailed to the residence of the defendant's estranged wife. Five months prior to the filing of the complaint, the defendant and his wife had separated and the defendant had moved out of that residence. Although the plaintiff transposed the numbers in the wife's address, the wife received the summons and complaint. The First District Court of Appeals held that such service was not reasonably calculated to reach the defendant under due process standards.

{¶23} While due process does not require service to be attempted only where it has the most likely chance of succeeding, courts must look suspiciously on service that is directed to a location other than the defendant's residence. *Swinehart* at 406. Here, Erin Capital chose to serve Fournier at her parents' residence instead of at Fournier's own residence. Because Fournier owns a house in Columbus, the address of her residence is readily available through a publicly accessible database. Given the ease with which Erin Capital could have discovered Fournier's address, we view Erin Capital's choice to serve Fournier at her parents' residence with suspicion.

{¶24} When serving a summons and complaint, "[t]he means employed must be such as one desirous of actually informing the [person] might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315, 70 S.Ct. at 657. Here, Erin Capital opted to serve Fournier at an address where she did not ask or expect to receive mail. Fournier's actual receipt of the complaint and summons depended entirely on whether her parents were willing to and remembered to pass the mail on to her. We conclude that this haphazard method of transmitting notice was not reasonably calculated to apprise Fournier of the action against her.

{¶25} In arguing to the contrary, Erin Capital posits that it could reasonably expect Fournier to receive service because Fournier and her parents lived within walking

distance of each other. Implicit in this argument is the contention that Fournier's parents could easily give Fournier the summons and complaint. We, however, concluded in *Apostolouski* that a plaintiff cannot satisfy due process by serving a defendant's parent and assuming that the parent will transmit the summons and complaint to the defendant. Id. at ¶34. Due process "requires more than the supposition a parent or other relative will necessarily tell the target of service." *Zirbes v. Stratton* (1986), 187 Cal.App.3d 1407, 1418.

{¶26} Erin Capital next argues that it could reasonably expect Fournier to receive service at an address which appeared on her pay stubs. We might have been persuaded by this argument had the record contained any evidence that Erin Capital relied on the pay stubs in deciding where to direct service. However, Erin Capital received copies of two of Fournier's pay stubs *after* the trial court granted it default judgment. Thus, the pay stubs could not have influenced Erin Capital when it chose the address to list on the complaint for Fournier.

{¶27} Erin Capital also argues that service at the Sixth Street address was appropriate because Fournier "may have used [that address] for mailings at certain times since she began the process of moving back to Ohio" and Fournier "stayed [there] on occasion." Appellee brief, at 14. Aside from the pay stubs, the record contains no evidence that Fournier ever used her parents' Sixth Street residence as her mailing address. Fournier also affirmatively denied ever using her parents' address as her permanent address. Moreover, although Fournier visited her parents' residence, she had her own place of abode. Since moving to Columbus in 2003, Fournier has maintained a residence—and a mailing address—separate from her parents.

{¶28} Next, Erin Capital argues that Fournier's actions, particularly her submittal of two payments, suggest that Fournier was aware of the lawsuit against her. We do not disagree with this evaluation of the evidence. However, "a defendant's general awareness of the suit 'does not dispense with the necessity of service.' " *Apostolouski* at ¶36, quoting *Maryhew* at 157. See also *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶16; *Bell* at 203.

{¶29} In its final argument, Erin Capital contends that this court must defer to the trial court's assessment of the competency and credibility of the evidence of nonservice.

We recognize that "[t]he determination of whether service of process was sufficient in any particular case rests on the factual evaluation by the court and is within the sound discretion of the court." *C & W Investment Co. v. Midwest Vending, Inc.*, 10th Dist. No. 03AP-40, 2003-Ohio-4688, ¶13. However, in determining whether valid service occurred, a trial court cannot wholly disregard testimony that is uncontradicted by any other witness or circumstance. *Hayes v. Kentucky Jt. Stock Land Bank* (1932), 125 Ohio St. 359, 362, 365. Here, none of the facts relevant to the due process analysis are disputed. No evidence contradicts Fournier's testimony that she owns a residence at 684 Mohawk Street or that her parents' live at 695 South Sixth Street. There is also no evidence that, aside from her pay stubs, Fournier ever used her parents' address as hers. Based on the undisputed evidence, we conclude that the trial court abused its discretion in concluding that Erin Capital could have reasonably expected that Fournier would receive service of process mailed to her parents' address.

{¶30} As Erin Capital did not comply with due process in serving Fournier, the trial court never attained personal jurisdiction over her. Consequently, the August 17, 2009 default judgment is void, and the trial court erred in not vacating it.

{¶31} For the foregoing reasons, we sustain Fournier's assignment of error, and we reverse and remand this case to the Franklin County Municipal Court for further proceedings in accordance with law and this decision.

Judgment reversed; cause remanded.

DORRIAN, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶32} I respectfully dissent. I think that the trial court was within its discretion to find that service of process had been perfected, so the underlying judgment was valid.

{¶33} Alison R. Fournier's mother filled out an affidavit in which the mother swore that she had "no recollection of having ever received that mail," referring to the ordinary mail service of the complaint. The United States Postal Service did not return the ordinary mail service, which implies that the mail arrived at the address. The mother's affidavit does not say who else lives at the address and might have taken in the mail, but apparently Alison's father also lives there and presumably could have handled

the mail. In testimony at an evidentiary hearing later, Alison's mother acknowledged that her husband also handled the mail.

{¶34} The mother and daughter live only a few blocks from each other in the German Village area of Columbus, Ohio. Alison worked at Jacob Neal Salon Innovations where her mother was the office manager. Under those circumstances, the mother and daughter in all likelihood communicated daily. The mother and daughter used the mother's address for payroll purposes for many years.

{¶35} While testifying before the trial court, when Alison was asked by the judge if she got any mail before the judgment was entered, she responded, "[n]ot at my correct address." (Tr. 18.) In other words, she acknowledged receiving mail but not at her own residence a few blocks away from the residence of her parents. The trial court could very reasonably have inferred that Alison's parents accepted mail for their daughter and made it available for her when she stopped by or visited. Again, Alison's mother acknowledged that her husband sometimes got the mail.

{¶36} Alison, when testifying before the trial court, admitted that she had no stable address for a period of time and "stayed with various people." (Tr. 10.) She acknowledged staying with her parents at their German Village residence for as much as five days at a time. This was as long as seven years earlier. Alison acknowledged she left her mother's and father's address as her address on her pay stubs for seven years.

{¶37} Alison clearly should have known she had a significant credit card debt because she received numerous telephone calls at work regarding the debt. She denied under oath owing the money because she claimed she had not received documentation she requested, other than obviously two notices of garnishment after judgment was entered. She also claimed "I just don't recall it." (Tr. 15.) The judgment was for over $12,000.

{¶38} Alison's memory also got fuzzy when she was asked if she recalled the details of talking to the law firm which sued her, although she acknowledged having several conversations with them. She also acknowledged filling out worksheets to avoid garnishment after judgment without contesting the underlying judgment.

{¶39} Under the circumstances, the trial court was well within its discretion to find that service had been perfected and therefore the judgment was valid. At a

minimum, if Alison did not actually receive the copy of the complaint sent to her parents' address, the service at that address was certainly reasonably calculated to be received by her. Under the circumstances, the trial court could also have concluded that Alison was not telling the truth about not receiving the complaint. Alison apparently took her credit card debt seriously only after she was garnished a second time.

{¶40} I would overrule the only assignment of error and affirm the judgment of the trial court.